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Paper No. 27

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MAY 05 2004

In re Application of : **OFFICE OF PETITIONS**  
Fedida et al :  
Application No. 09/526,547 : ON PETITION  
Filed: March 16, 2000 :  
Attorney Dck't. No. JEL-31040: :

This is a decision on the petition filed January 12, 2004, under 37 CFR 1.183 seeking waiver of the rules.

The petition under 37 CFR 1.183 is **dismissed**, subject to renewal as indicated below. Any renewed petition must be captioned "Renewed Petition under 37 CFR 1.183 for Waiver of 37 CFR 1.193" and must be filed within **TWO MONTHS** of this mailing. See 37 CFR 1.181(f). Extensions of time are not permitted under 37 CFR 1.136(a) or (b).

Petitioner seeks waiver of the rules to permit entry of the concurrently filed: (1) Reply Brief, and (2) a Request for Oral Hearing, both being untimely under their respectively governing rules (i.e., 37 CFR 1.193; § 1.194). Petitioner acknowledges receipt of the Examiner's Answer of October 20, 2003, but asserts that through inadvertent clerical error, the due dates for timely filing the aforementioned documents were not entered in counsel's docketing system.

Normally, delay caused by clerical inadvertence or error is not an adequate basis for requesting waiver of the regulations. See In re Kabushiki Kaisha Hitachi Seisakusho, 39 USPQ2d 1319, 1320 (Comm'r Pat. 1994). As there is no requirement for the timely submission of a Reply Brief, to avoid the abandonment of an application, the failure to timely submit such an amended reply brief has not resulted in the abandonment of this application. Accordingly, this application is not abandoned, and the provisions of 37 CFR 1.137(b) do not apply in this instance. Nevertheless, it is appropriate to apply the principles thereof to the situation at issue.

Petitioner may wish to consider renewing the petition under 37 CFR 1.183 and requesting that the Director waive the timeliness requirement of 37 CFR 1.183 and accept the delayed Reply Brief as if timely filed on the grounds that the delay was unintentional.<sup>1</sup>

A petition requesting acceptance of a delayed Reply Brief on the grounds of unintentional delay must be filed promptly and such petition must be accompanied by (1) by the amended reply brief, unless previously filed, (2) the petition fee set forth in 37 CFR 1.17(m), and (3) a statement that the "delay was unintentional."

<sup>1</sup> It is brought to petitioner's attention that 37 CFR 1.183 sets forth that waiver of the rules is "subject to such other requirements as may be imposed."

Petitioner should note that such will only remedy the belated Reply Brief, and will not remedy the question as to whether the Board of Patent Appeals and Interferences will accept the untimely Request for Oral Hearing. That is, per MPEP 1002.02(f), ¶ 4(b) the Chief Administrative Patent Judge of the Board of Patent Appeals and Interferences (BPAI), or his designee, has the delegated authority to waive any rule in any matter before the BPAI. As such, and considering that the request for Oral Hearing under 37 CFR 1.194 is a matter more directly relating to superintending the functions of the BPAI, it would not be appropriate for this office to concurrently intrude upon the jurisdiction of the BPAI and decide the request for waiver of 37 CFR 1.194. Rather, such request should be re-presented as a separate paper and petition addressed to the BPAI, along with the renewed petition for waiver of 37 CFR 1.193, which this Office can decide.

Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries relative to this decision should be directed to the undersigned at (703) 305-1820.

  
Brian Hearn  
Petitions Examiner  
Office of Petitions  
Office of the Deputy Commissioner  
for Patent Examination Policy